

**Michigan Department of Community Health**  
**Dialogue On Self-Determination and**  
**the Children's Waiver/Choice Voucher**  
Based Upon Questions Submitted by Pathways CMHSP on 1/27/03

Note: The following questions and the department's initial responses to these inquiries are part of an ongoing dialogue within the public mental health system on how to conceptualize and implement self-determination and consumer-directed service and support arrangements. Activities under the Robert Wood Johnson Grant and the continuing efforts of local sites have surfaced various issues related to this ongoing transformation of the public system. This document represents another step in the our efforts to think through - with consumers, families, advocates, CMHSPs and PHPs - different conceptual, policy, regulatory and technical considerations related to self-determination and consumer-direction.

The public system is moving inexorably toward greater freedom, support, control and empowerment for consumers of the system. We have learned a great deal about how to promote, develop and implement different models and approaches to self-determination and consumer-direction, but there is still much to be discovered, resolved, and applied. In our answers, the department has tried to retain this spirit of inquiry and dialogue, recognizing that our answers will spark new discussion and lead us to further refinements in our answers, our policies and our implementation strategies.

**I. a. Will the department require all CMHs to do things exactly the same way regarding Self-Determination and the Children's Waiver Choice Voucher<sup>1</sup>?**

- i It is not expected that all PHPs/CMHSPs will, or should, do things exactly the same way when implementing policies and practices promoting self-determination
  - The Self-Determination Policy and Practice Guideline sets broad parameters and identifies options which should be present in a PHP/CMHSP's local system.
  - Elements of this system should be constructed in ways that work best for the people served and the particular local structure.
  - The spirit and central intent of the policy principles and practice

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<sup>1</sup> The use of the Choice Voucher System with the Children's Waiver is a specific method to allow and support family control over the selection and direction of provider staff. It is not the same as self-determination, and it entails use of a specific set of arrangements in a fee-for-service system. Throughout this document are several responses to technical elements of the Choice Voucher System. The elements of this system are the same for both self-determination and for the Children's Waiver.

statements need to be evident in the local policies and methods intended to achieve implementation.

- When asserting that self-determination is in place it is necessary to provide real and workable options for consumers to use to have meaningful authority over the resources allotted for their services and support arrangements.
  - The PHP/CMHSP must make available a range of direct control options, only one of which would be the Choice Voucher System. (Cf II-b)
- i Each PHP/CMHSP should strive to achieve expanded understanding among managers, professionals, staff, provider agencies, families and consumers
- S About the value of supporting consumers to define, control and direct their own lives;
  - S About options for control and direction which meaningfully promote freedom and independence.
  - S Of the fact that many consumers and advocates view the opportunity to pursue self-determination within the services system as a matter of civil and human rights.
- i Evolution towards self-determination is a slow process; it requires deliberate planning to bring along your system's stakeholders.
- S At a local system level, the PHP/CMHSP must develop the knowledge and attitudes at all levels of staff, providers and board about the principles of self-determination, and about methods of developing and applying arrangements that support true consumer self-determination.
  - S Leadership that explicitly supports the direction of self-determination, and sanctions the development of local policies, methods, and practices that support self-determination is central to achieving and maintaining meaningful progress.
  - S DCH does not anticipate that large numbers of consumers will seek the route of self-determination at the outset of local implementation of the policy and practice guidelines.

- S Even in locales that have been involved in self-determination for the past five years, the change process has been slow. Those with organized strategies have had the most success.
  - S Assisting and guiding current providers to develop values and practices that emphasize increasing a person's sense of choices and options, support personal decision-making, and promote self-assertion, will assist an evolution toward practices that are truly person-centered and supportive of self-determination.
  - S This sort of evolution is as important to an expanded opportunity for persons to achieve meaningful control in the face of intensive and ongoing services/supports needs, as is the use of methods involving self-direction of support staff.
- i Consumers are in many different states of 'readiness' to pursue self-determination.
  - S This includes those closest to them in their lives, whether they be family, friends, or provider staff.
  - S Some consumers possess clear ideas about what they want their life to be like. They may have made many connections and have a clear understanding of their role in their community.
  - S Others have been sheltered from participation in choice-making and participation in other than segregated care settings. They may have little sense of how to proceed with developing a life plan and taking the steps toward that plan.
  - S Some individuals are very dependent due to the degree of their impairments or because they lack other people in their life circle who can provide nurturing and informal guidance to assist their development, outside of traditional care settings.
  - S In general, our system, progressive though it is, has many features that work against the attainment of personal freedom when one requires a significant degree of support.
  - S The process of bringing people along will require supporting the personal transition from significant emotional and psychological dependence to personal control and direction over one's life.
- i Consumers, in moving into arrangements that support self-determination, need to be able to access alternative ways for pursuing achievement of their life plan, in light of their current circumstances.

- S This means that the PHP/CMHSP should revise its policies and practices to allow for the existence of several alternate methods to operationalize control and direction of the consumer's own life.
- S In general these should be avenues that allow consumers to responsibly control the resources allotted for their supports and services.
- S It would not be expected that each and every person who is deemed to be "in" a self-determination arrangement would always choose to be directly employing support staff and using a fiscal intermediary.

**b. Who will make the ultimate decision on how SDI should be implemented - will this come from DCH as an amendment to the Master Contract, or will each CMH or PHP make the decision on how to implement SDI?**

- i The decision to implement self-determination as a matter of policy for the public mental health system has already been made.
  - S It is expected that each PHP/CMHSP will continue to build on the local implementation process as was assured in PHP responses to the Application for Participation.
  - S With recognition that all PHP's and their affiliates are not in the same place with their implementation efforts, there should be observable progress being made toward accomplishment of the policy, per commitments made in the AFP, as determined by the DCH review process and feedback from consumers and advocates.
  - S Commitments made in the AFP regarding self-determination are a matter of contract for the PHP's.
- i The Department intends to issue the final policy later this fiscal year.
  - S It will define self-determination, state that the "practice " must adhere to the principles, and seek to accommodate the elements of the practice guideline.
  - S The policy will be provided to the PHP/CMHSPs and to consumers and advocates.
  - S The policy will become a contractual item in the next Fiscal Year.
  - S The Department will facilitate the provision of necessary technical guidance.

- S It is the intent of the policy to allow all adult consumers the opportunity to invoke the policy across the CMH system. However, the Department will work out plans for the PHP/CMHSPs to phase their efforts over the next year, so as to assure quality and manageability of implementation.
- S It is not the desire of the Department to have to mandate conformity with specific steps but to facilitate what needs to be a good-faith local effort to pursue and achieve implementation.
- S Local implementation efforts need to include significant involvement of consumers, family members and advocates in the process of design, participation and evaluation of these efforts, in conformance with the intent of the Application for Participation development process, and the Consumerism policy.
- S Consumers, family members and advocates will be queried about their views and their experiences with local system efforts as a part of any assessment of local implementation outcomes.

**II. a. What is the recommended arrangement under SDI for those that provide supports to the consumers?**

- i There is no one option or arrangement that will work for everyone at any given point in time.
  - S Arrangements should be those that fit best with the consumer's goals and preferences, flowing from the policy and the elements of the practice guideline.
  - S They also must be arrangements that are easily navigated by the consumer (or, as applicable, his/her chosen representative)
- i There are a range of options that can provide greater control and direction for a consumer.
  - S Some of these are dependent upon the PHP/CMHSP and its existing service network having in place certain operational methods that are not practiced widely.

< An example might be where a contracted or directly operated program has policies and procedures in place that authorize the consumer to have all or the largest portion of say about which specific staff will provide services to the consumer<sup>2</sup>.

S Other options provide the consumer with greater independent direction and control because they are established outside of and in addition to, the existing service network.

< An example is the Choice Voucher System. The person solicits and employs his/her own support and service personnel, or contracts directly with a relevant service provider entity.

b. That is, should/can the consumer, guardian, and/or parent (of a minor or adult child) be the actual employer?

***Can the consumer/guardian/parent be the employer of record?***

i An adult without a legal guardian may legally enter into a contract.

S This includes entering into an employment contract with another person to provide care and support, or a contract with a separate entity to provide a service.

S Contracts between adult parties are an essential part of commerce. Their existence is governed under what is usually termed “common law.”

S In cases where the person has a legal guardian with authority over contracts, the guardian or another representative must be the employer of record.

S A consumer may also choose another person to act as their representative, and that person may be the legal employer. Typically where a consumer does have a representative performing the employer function, that person is a relative, such as a parent or a sibling, although others may play that role.

S Whether a consumer is the employer of record or has a representative performing that function, the PHP/CMHSP is expected to support the consumer to take the lead in responsibly expressing preferences and goals, to direct their support workers.

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<sup>2</sup> In practice, it is relatively meaningless to assert that consumers have control and direction over staff when the arrangement for service provision is a congregate setting. This is particularly true in settings where the provider must be licensed.

- i A distinction needs to be drawn between the legal right any individual may have to enter into a contract (including an employment contract), and their authority to apply the funds under the stewardship of the PHP/CMHSP to underwrite the costs of that contractual arrangement.
- S Just because the consumer desires or has planned to self-direct services by retaining a person as their employee, it does not directly follow that the PHP/CMHSP is thereby obligated to use its funds to underwrite payroll costs. This approval results from the person-centered planning process leading to final agreements about plan, individual budget and the methods to be applied to support self-direction and control.

***What is the range of options that can be used to provide control and direction over the provision of services and supports?***

- i A PHP/CMHSP shall design and implement alternative approaches that consumers using an individual budget may choose to use to obtain consumer-selected and -directed provider arrangements.
- S Among these are arrangements whereby a consumer or their chosen representative may become the employer of record, using the Choice Voucher System. However there are other options that offer relative direct control, including:
  - < Requirements in contracts between the PHP/CMHSP and its providers that afford the consumer authority in selecting, directing and dismissing the specific staff who are assigned by the provider to furnish services/supports to the consumer;
  - < Personnel and operating policies that afford a similar type of opportunity to exercise choice and control over the staff who come into the person's life to provide supports and services, for those directly operated programs of the PHP/CMHSP;
  - < Consumer contracts with provider entities who, although they are the employers of record, agree to contractual language in their agreement that affords the consumer a role in selection, direction and dismissal of the provider's staff engaged in furnishing services to the consumer;
  - < Use of an entity that acts as the employer of record, allowing consumer-selected (qualified) individuals to be hired by that entity, but who work under an at-will employment agreement that allows the consumer to be the managing employer.

- The consumer not only selects the individual, but schedules, orients, and directs the work of this individual in the process of supporting him or her, as outlined in the consumer's plan of services and supports.
- Arrangements such as this must also include the option for the consumer to dismiss the individual, without interference from the entity that is the employer of record. Flanagan<sup>3</sup> terms this sort of entity an "Agency with Choice." In Michigan, the more common term is a "staff leasing agency."

***Should the consumer/guardian/parent/representative be the employer of record?***

- i In determining which sorts of arrangements are to be used, the PHP/CMHSP should base their authorization for a particular approach on:
  - S The consumer's preference;
  - S The consumer's capability to manage the desired arrangement. "Capability" would be gauged by considering the support available from chosen family and friends to assist with managing the preferred arrangement (Cf also, III-a), and:
  - S other related factors that appear to impinge upon the adequacy and potential success or failure of a given approach.
- i The forum for deliberating and finally deciding this is the person-centered planning process.
  - S It is unacceptable for the PHP/CMHSP to arbitrarily determine what methodologies a person may access and use, simply because it is convenient for the PHP/CMHSP to do so.
    - < For example, a PHP/CMHSP may not deny individual consumers the right to select, employ and manage their own (qualified) providers, simply because PHP/CMHSP directly operates similar services and programs.

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<sup>3</sup> "Consumer-Directed Personal Assistance Services: Key Operational Issues for State CD-PAS Programs Using Intermediary Service Organizations", by Susan A. Flanagan and Pamela S. Green, October, 1997





- S In determining what it will allow, the PHP/CMHSP must assure that the best interests of the consumer are the basis for the decision. This includes honoring his or her preferences. Tendencies toward supporting only those arrangements that best fit the CMSHP's current methods of operating services and supports should be analyzed and avoided. They may well be in conflict with consumer best interests or contrary to self-determined goals and outcomes.
  
- i The PHP/CMHSP is not obligated to afford arrangements that offer direct control where the PHP/CMHSP is concerned that the arrangements are beyond the capabilities of the consumer even with the provision of support, and would lead to administrative impediments and even a significant potential for harm to the individual.
  - S Arrangements finally authorized should be ones that come out of agreement in the PCP process.
  
  - S Approval of a particular set of arrangements should not be based on either surrender to pressure or imposition due to frustration, on the part of PHP/CMHSP staff. It should result from sufficient discussion and consideration to achieve a consensus, via the PCP process.
  
  - S Although a person may possess the legal status to be the employer, the PHP/CMHSP may be unwilling to authorize that person to use PHP/CMHSP funds to underwrite the costs of the employment relationship. Reasons include:
    - < Concerns about personal capacity and an accompanying lack of support from others sufficient to succeed in that endeavor.
  
    - < Evidence that the consumer would be negatively affected (e.g. put at significant risk) by taking this route.
  
    - < Certainty on the part of the PHP/CMHSP that the consumer or his representative is not going to follow the agreements that would be necessary with the PHP/CMHSP, or between the consumer and their support staff.
  
  - S It is completely within the authority of the PHP/CMHSP to decide what self-determination arrangements it will and won't support for each consumer. It is, however, expected that the person's planning process will be facilitated so that, to the greatest extent possible, final decisions are those that best support the consumer, and best build their personal sense of control and direction over their life.

**c. If this (i.e. consumer/guardian/parent being the employer of record) is possible, what would be the recommended arrangement for the employees of consumers?**

- i An agreement to allow the use of PHP/CMHSP funds by the consumer to underwrite the costs of consumer-directed services and supports where the method is to be direct employment by the consumer or his/her representative, must be in writing (e.g., a Self-Determination Agreement or a Children's Waiver Voucher Agreement.) The agreement must:
  - S Delineate the elements of an explicit understanding between the PHP/CMHSP and the consumer, representative, or parent.
  - S Result from the process of crafting a plan of services/supports, and a budgeted amount of funds to be used, developed through the person-centered planning process.
- i In the process of developing the agreement, any specific concerns and issues pertinent to that consumer self-directing their services would be identified, as well as agreement on their resolution. This would include:
  - S Discussion about the desirable and possible services/supports options that can accomplish the plan's goals and objectives, and the importance of the consumer or their representative assuring that funds allotted by the PHP/CMHSP are used only for those purposes.
  - S Acknowledgment that the consumer or their representative is assuming responsibility for certain tasks that are ordinarily the responsibility of the PHP/CMHSP or a provider entity, and that there are associated pitfalls;
  - S Provision of full information to the consumer (or representative) about what they need to know to apply and manage the arrangements they intend to use to pursue self-determination;
  - S Explanation about various options and alternative ways to achieve the plan of services/supports, and that the consumer has a choice about these;
- i Where a consumer has a representative who will be acting as the employer or the contract holder, the agreement must be with that representative, as well as the consumer.
- i The PHP/CMHSP may not permit the use of funds under its stewardship to pay costs of an employment agreement that are not used to provide assistance aimed at accomplishing the agreed-upon goals, objectives and outcomes in the person's plan.

- S Funds are never to be directly provided to a consumer, their representative, or a parent.
- S Funds must be paid for authorized services and supports to providers who have been verified as meeting stated qualifications.
- S Funds are not to be paid by an intermediary entity to a provider, unless other elements of the Choice Voucher System are in place, specifically the various written documents.
  - < Among these are a written employment agreement between the consumer/guardian/representative/parent and the employee.
  - < When Medicaid funds are to be used, there must be a provider agreement between the provider furnishing services and the PHP/CMHSP<sup>4</sup>.
  - < Prototypes to guide the development of local agreements are provided in Choice Voucher System Technical Advisories for both Self-Determination and the Children's Waiver.

**d. Please provide written guidance on how this arrangement addresses the concerns of:**

**- The attorney general's office, regarding whether these monies are considered income for the consumers;**

We are not aware of any concerns from the Michigan Attorney General's office. If you possess any written information from the Office of the Attorney General that identifies concerns on their part about this matter, Please provide us with copies so that we may review them.

**- The IRS regarding whether these monies are considered income for the consumers;**

If the appropriate and documented arrangements are used, no funds will be paid to the consumer (i.e. the use of funds to pay one's personal assistance staff is not accessible to the consumer in the form of a cash grant), and therefore the IRS would not consider these funds to be income to the consumer. (Even if these funds were

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<sup>4</sup> This provider agreement is not the same as an employment contract. The required provider agreement has the provider stipulating to the CMHSP that the provider will conform to the requirements of 42CFR431.107.

provided as a cash grant for the purpose of obtaining personal assistance services, there is precedent that these funds would not be considered income for IRS purposes.<sup>5)</sup>

The consumer or their representative is directing funds that have been allotted for the purpose of paying his/her personal assistants who are employed by him/her, in accordance with their plan of services. These funds, under the Choice Voucher System, are allotted to a third party fiscal agent. The Internal Revenue Code, at Section 3504, provides for a third party to be the agent of the employer for the purposes of handling the employer's payroll tax obligations. The IRS has further explicated how this option (Employer Agent) is accessed and used, in IRS Revenue Procedure 70-6. Under the Choice Voucher System, funds are never paid to the consumer, but from the PHP/CMHSP to the fiscal intermediary, and then, upon consumer authorization, to a qualified provider. Providing Medicaid funds directly to a beneficiary is a violation of the Social Security Act, except in certain very limited circumstances, none of which apply here.

The IRS is familiar with these sorts of arrangements, as they (Consumer-Directed Personal Assistance Services) exist in several states. Arrangements whereby welfare recipients are enabled to direct Medicaid and non-Medicaid governmental funds to pay the wages of personal care workers they have hired have never been deemed to be income, if they do not pass directly to a beneficiary. IRS Revenue Procedure 80-4, a regulation that expands upon IRS Revenue Procedure 70-6, was developed to implement Section 3504 of the Internal Revenue Code when a state or local governmental entity, itself, is acting as an Employer Agent and directly administering the funds (as opposed to placing the funds in a third-party fiscal agent for distribution).

In "Section 1 PURPOSE" of Revenue Procedure 80-4, it is stated: "The purpose of this revenue procedure is to set forth the procedures to be followed by state and local health and welfare agencies wishing to act as agents, under section 3504 of the Internal Revenue Code, for welfare recipients who become the employer of individuals furnished by the agencies to provide in-home domestic services for the welfare recipients." This and accompanying language in this Revenue Procedure provides ample evidence that the IRS is not only familiar with arrangements involving consumer-directed personal assistance, but has made specific account for this option to be possible.

**- How would this affect the consumer's Medicaid status, and;**

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<sup>5</sup> "Liability Issues Affecting Consumer-Directed Personal Assistance Services - Report and Recommendations", by Charles P. Sabatino, J.D. and Dr. Simi Litvak, published in the Elder Law Journal, Volume 4, No. 2, 1996, pp 266-277

If constructed properly, the consumer will not be the recipient of income, and there would be no effect on their Medicaid eligibility status.

**- What responsibility does Pathways have, being these are capitated dollars that are being used?**

Pathways must assure that Medicaid funds are expended for services/supports that are necessary to accomplish the goals, objectives and/or outcomes that the PHP/CMHSP has agreed to support through the use of its funds, as delineated in the person's individual plan of services or supports. Pathways must also assure that the funds are paid to a qualified provider of the Medicaid covered or alternative services/supports. Pathways must assure that such transactions are based upon contracts or employment agreements. Since these are Medicaid funds, the Center for Medicaid & Medicare Services (CMS) has required that a separate "provider agreement" between the provider furnishing services and the PHP/CMHSP meeting the stipulations of 42CFR431.107, be in place.

**- (Please address) any DCH Audit Division concerns that may arise, recommendations from MMRMA, etc.**

- i "DCH Audit Division concerns" about the use of self-directed arrangements have not arisen in any audits performed to date. As this option expands, and as the Department finalizes and publishes the policy, the Department will assure that DCH auditors are familiar with the policy, and that the practices which may be in use to accomplish the policy fall within the scope of allowable practices, from the vantage of the auditors.
- i The Department is willing to meet with Michigan Municipal Risk Management Authority representatives to assure their full understanding of the policy and the preferred or recommended practice methods.
- i With regard to concern about general liability and etc., we are not aware of any Michigan litigation or insurance claims specifically emanating from the use of the Choice Voucher System. If you are aware of any or have such documentation, please share this with us.
- S We are aware of an unsettled contract dispute involving another PHP/CMHSP and a party that was functioning as a fiscal intermediary for that PHP/CMHSP.
- S This dispute is not the result of the Choice Voucher arrangement itself. In fact, in that situation, the arrangements that were put into place were not followed by the fiscal intermediary.

- i There is little case law that is directly pertinent to the arrangements entailed in the Choice Voucher System, or in reference to similar consumer-directed arrangements in other states. A review of the literature <sup>6</sup> advises that liability is reduced when:
  - S Full information is provided to the consumer, their representative and to involved employees, so that all know the nature of the situation and the relationships;
  - S Relationships are explicit and separate with regard to who is accountable to whom and for what tasks, and;
  - S The consumer/guardian/parent has a choice of whether or not to participate in a self-directed arrangement.

**III. a. If the consumer was to be the employer, is there any required criteria to determine competence as an employer?**

The presumption is that an adult person is competent, unless a court has deemed otherwise.

There are no precise legal or other standards that give one a yardstick by which to measure “competence” as an employer, either for people with disability labels or for those who do not possess such labels.

In the State Medicaid Manual, a document developed by CMS that provides policy direction on the Medicaid program, in the section on the personal care optional state plan coverage (Section 4480, attached) there is guidance provided to states as follows in section 2: *“Consumer-Directed Services.--A State may employ a consumer-directed service delivery model to provide personal care services under the personal care optional benefit to individuals in need of personal assistance, including persons with cognitive impairments, who have the ability and desire to manage their own care. In such cases, the Medicaid beneficiary may hire their own provider, train the provider according to their personal preferences, supervise and direct the provision of the personal care services and, if necessary, fire the provider. The State Medicaid Agency maintains responsibility for ensuring the provider meets State provider qualifications (see E below) and for monitoring service delivery. Where an individual does not have the ability or desire to manage their own care, the State may either provide personal care services without consumer direction or may permit family members or other individuals to direct the provider on behalf of the individual receiving the services.”* This general directive - - that the person have

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<sup>6</sup> Cf. Sabatino & Litvak, pp 298-313

the desire and the ability to be the employer - - must be considered in context of the life situation of each person. That is, some individuals may possess the legal potential under common law to be an employer, but cannot perform those functions without assistance or support. For some of these individuals, there may be a group of involved family and friends or even trusted staff, who can assist by providing needed support and guidance. For others there may be no such support, and therefore it is not realistic (nor prudent) for the PHP/CMHSP to authorize use of its funds to underwrite the costs of a directly employed assistant. With experience, the PHP/CMHSP will develop a set of practices that can provide guidance to those working in their system who are charged with approving self-determination arrangements.

It is important that any consumer and/or their representative (or a parent, as applicable in the Children's Waiver) be provided with full information about the set of arrangements that they are considering with the Choice Voucher System, and that it be explicitly understood that the arrangements entail responsibilities, as an employer, as the determiner of services obtained and in the use of Medicaid funds. It must be made clear that these responsibilities are accompanied by problems if they are not handled properly. It is also important that the PHP/CMHSP provide for support mechanisms (e.g., use of a properly defined, constructed and oriented fiscal intermediary entity) to ensure that tasks the consumer/guardian/parent is not likely to want to handle, are otherwise accounted for.

**b. Could we have written guidelines and policies of DCH with respect to enrollment of clients in the SDI program (CD-PAS) including eligibility criteria, competency guidelines for choice initiatives, and eligibility guidelines and criteria for client's acting as an employer, including all tax filing guidelines.**

Please see previous responses to similar questions, above.

**c. What if it's a family member or guardian chooses to be the employer?**

This, as noted above, is acceptable if it is agreed to by the PHP/CMHSP. Where a family member, guardian or another chosen representative is to be the employer, or is otherwise responsible for authorizing and directing service delivery, it is central that the consumer's needs, preferences, goals and objectives are what is being supported, not those of the primary employer party.



**d. Regardless of whether the consumer, guardian, and/or family member is the employer, are there any reporting responsibilities of the CMSHP or PHP staff, especially a Supports Coordinator, regarding poor quality of care or failure to provide care as specified in the plan or budget?**

One of the functions of Supports Coordination is monitoring the delivery of services/supports. Whether there is a consumer-directed and controlled arrangement or not, the monitoring function is an essential aspect of accountability that the PHP/CMHSP assumes. In addition, it would be expected that a fiscal intermediary, acting on behalf of the PHP/CMHSP to make payments to an individual or provider organization for services rendered in accordance with the individual's plan, would establish mechanisms to make certain that no such payments are made unless there is a current, written contract or agreement in place. There must also be documentation that the service to be paid for was provided, and that the consumer or representative has verified that fact (e.g., by approving a worker's time sheet.) Without these safeguards being made explicit as a matter of contract with a fiscal intermediary, the PHP/CMHSP may risk having its funds paid out for work that is not eligible for such payment.

The PHP/CMHSP may end a consumer-directed arrangement at its option. Prior to taking this action, however, and unless the person's health and welfare are at imminent risk of harm, the PHP/CMHSP is expected to use the person-centered planning process to raise concerns, achieve a joint understanding, and pose alternatives for resolution of the problem situation.

**e. What would be the reporting responsibilities of the employer to the CMH or PHP regarding services/supports received?**

These are to be specified by the PHP/CMHSP in the self-determination agreement with the consumer or their representative. (This could be done as an attachment so that if changes need to be made, the whole agreement is not necessarily on the table.) Most PHP/CMHSPs currently involved in consumer-directed arrangements are building in those requirements so that the actual mechanics of compiling and reporting are conducted by the fiscal intermediary. Direction to obtain at least the Department-required minimum elements, whatever they may be, needs to be part of the written agreements with both the consumer and the fiscal intermediary entity.

**IV. a. We would also need clear direction on what level of responsibility the PHP/CMH would have regarding basic employment responsibilities if the consumer or others were the employer.**

Please review the responses to item II-c

**b. Do householder standards apply in this situation?**

If by “householder standards”, you mean IRS Household Employer requirements, it seems (cf. Flanagan, pp 46-48) they would apply. Please see IRS Publication 926, “Household Employer’s Tax Guide.”

**c. Would Pathways need to require verification of the purchase of liability and worker's comp insurance?**

Yes. One option for assuring this would be through assignment to the fiscal intermediary in their contract with the PHP/CMHSP.

**d. Would there have to be verification of withholdings and payment of federal or state income taxes, social security tax payments for both the employee and employer share?**

Yes, with assignment to the fiscal intermediary, as part of their contract with the PHP/CMHSP.

**e. What about employee rights such as EOC, sexual harassment protection, overtime, etc.**

Addressing employee rights should occur through the process of assisting and supporting the consumer, family member or representative to conduct the hiring process. Information about how to conduct the hiring process should be a part of an overall orientation to being an employer, and should be made available to those who will be conducting the hiring process or supporting the individual who will be the actual employer. This process may be conducted either directly through the PHP/CMHSP, or by the fiscal intermediary entity.

Overtime requirements are part of the Fair Labor Standards Act, and a person who is going to be functioning as the employer should be aware of the requirements for overtime compensation and should either be able to track him/herself, or be assisted in tracking the use of overtime, for the purposes of tracking and managing the utilization of the individual budget or allotment of funds. Since the fiscal intermediary is delegated the responsibility to conduct the payroll functions on behalf of the consumer- or family member-employer, they would be expected to assure that overtime compensation is properly handled as part of the payroll agent process.

Sexual harassment and equal employment opportunity are elements of the Elliot-Larsen Civil Rights Act. It is advised that in developing support arrangements to guide and assist individuals on how to be the employer of their

staff, there should be guidance on the requirements of law that apply to them in their role as an employer. This function could be carried out through a fiscal intermediary entity, or through a separate third party (such as a consultant) or via PHP/CMHSP or provider entity staff.

As noted previously, it is important that full information be provided to the consumer/representative/guardian/parent, whomever is to be the employer of record, concerning their responsibilities as an employer. There are various publications available on this general subject, and the Department envisions facilitating the developing of additional Michigan-information that can be used as a part of this process by PHP/CMHSPs.

**f. What would be the safeguards that the consumer would have to have in place for specific training such as proper sharps disposal, back safety training, blood borne pathogens precautions, etc.**

It is expected that the written self-determination agreement between the consumer/representative/guardian (Or the Children's Waiver Choice Voucher Agreement between a parent) and the PHP/CMHSP would assure that there will be a process that assures the selected providers are qualified. This responsibility should nominally fall to the employer of record, but there should be support provided to assure that selected employees who are to be hired meet, within the PHP/CMHSP's criteria, the applicable provider qualifications. (Note: This same requirement would apply to any entity or individual who is retained to provide services.) In practice, assignment of the responsibility for verifying provider requirements to the fiscal intermediary can assure more consistency and focus than spreading out these functions among one or more supports coordinators, for example

**g. Currently, with the employees under Pathways payroll, we have required TB testing and CPR training. Would a consumer/employer have to require these same things?**

Yes. Provider requirements do not change by virtue of participation in self-determination.

**V. a. Can consumers/guardians/family enter into independent contracts for services?**

Yes, but this should be an aspect that is explicit in written self-determination agreements between the PHP/CMHSP and the consumer/guardian/family member. The PHP/CMHSP should provide direction about its expectations, and assure provision of the guidance and support necessary for the consumer/guardian/family to accomplish this.

**b. Do these contracts have to conform to any standards?**

They must encompass those requirements that the PHP/CMHSP feels ought to be included in such an agreement. Draft prototypes can be found in the Choice Voucher Technical Advisory booklets for self-determination and the Children's Waiver. These draft prototypes are very general and require that specifics be delineated locally, by the party doing the contracting, based upon guidelines provided by the PHP/CMHSP.

**c. Would the employees or contractors be required to receive Person-Centered Planning (PCP) training?**

No, currently there is no explicit requirement in any existing provider qualifications that PCP training be administered. However, it would be every PHP/CMHSP's goal to assure that the principles of person-centered planning and practices undergird the process of providing services/supports. Therefore it is in the best interests of the consumer and the PHP/CMHSP to facilitate this understanding for employees or contractors of a consumer/guardian/family member.

**d. Recipient Rights training?**

Yes, the fact that the consumer is directing the provision of services from a consumer-selected provider does not eliminate the intent of the mental health code that providers of mental health services and supports be aware of and report suspected violations of the code-protected rights of recipients. Further, it is the intent of the Code that individuals who participate in the provision of mental health services cooperate when asked in an investigation of an alleged violation of the rights of a recipient. Therefore, the PHP/CMHSP should assure that employees and contractors selected and retained by the consumer/guardian/ family member are so oriented. (Provision for this is contained in the draft prototype language for employment agreements in the Choice Voucher System Technical Advisory booklets. These draft prototype agreements are provided as examples, not as templates, and each PHP/CMHSP is advised to develop their own local process for assisting consumer/representative employers in writing their own employment agreements.) The specific format and process of such training is a local matter.

**e. Module Training?**

If, by "Module Training" you are referring to the Group Home Training Curricula, then no, this would not be an expectation, because the individual's living setting is not in a licensed specialized residential setting.

**f. Training on confidentiality, HIPPA, etc.?**

Yes, confidentiality and HIPAA privacy requirements apply to employees and contractors of the consumer/guardian/family member when they are retained to provide services/supports in accordance with the consumer's plan of services. Therefore, such training ought to be a part of the overall training made available. But keep it simple, please.

**VI. a. If this arrangement is possible, then is Pathways liable for any part of the consumers' employees?**

i Please see the guidance provided in responses to related previous questions.

i In the final analysis, just as is the case with many, many other activities that come under the purview of a PHP/CMHSP when providing for the needs of consumer/recipients, there is always a potential for liability.

S The earlier advice provided is aimed at pointing out the importance of placing individuals in arrangements wherein they will be the employer only when:

- < They have been fully informed about what is involved;
- < They are assured a choice of whether or not to participate in any given set of arrangements, and;
- < There is a plan for providing the needed support to enable success with handling the responsibilities of being the employer of record. These need to be outlined in the person's plan of services

i We understand there is a concern about Pathways being deemed the co-employer.

S Pathways cannot expect the Department to indemnify Pathways, due to the fact that Pathways is a separate entity, and the Department does not have direct control over how Pathways implements any given set of arrangements.

S The Department's perspective on methods and approaches that are advised or recommended are derived from the study of various others' writings and experiences.

S There is little to no evidence that proper use of these alternative methods will result in an adverse ruling by a court.

- S The Department can offer no guarantees to this, just as the Department offers no guarantees to immunity for any other actions a PHP/CMHSP might take.
- i But in our understanding of the nature of co-employment, we understand there to be no exact set of measures. Rather there are several aspects of an employment relationship that a court would look at.
- S This area is one that Pathways is best advised to obtain its own legal guidance as it constructs and puts into place its particular methods.
- S In seeking out that legal guidance, Pathways needs to spell out a specific scenario or set of practices or circumstances, and then ask its advisors to specifically comment on that.
- S One element of consideration would be the extent to which Pathways has:
- < Assured the provision of full information to the prospective employer of his/her rights and responsibilities in the employer role;
  - < Made a judgement that there is a reasonable capability for the individual to be the employer, and then arranged for the sort of support that might be necessary to assist that consumer with being the employer.
- S For more guidance our understanding of the elements that comprise what a court might look at if it was asked to rule that the arrangement was actually co-employment, please review IRS Publication 1779 (Rev 12/99).
- < It sets forth a list of specific functions that the IRS uses to determine whether a person is an employee or an independent contractor.
  - < Your attorneys will probably tell you that, to the extent you, rather than the individual, are conducting/controlling these functions, to that extent you are more likely to be determined a co-employer (i.e. incur corporate liability<sup>7</sup>), along with the individual.

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<sup>7</sup> Cf. Sabatino & Litvak p. 320

**b. Would these employees be considered at-will?**

If employees are considered to be “at-will”, then it is advisable to support the consumer/representative employer’s use of language in the employment agreement that specifies this, and to otherwise assure that there are not elements in the employment agreement (e.g., use of a probationary period, or use of preordained progressive discipline) that conflict with this status. In any event, what determines this is the employment contract between the consumer/guardian/parent and their worker.

**c. Is it then the sole responsibility of the consumer to train, complete criminal background checks, etc.**

In theory you would be expecting the consumer to conduct these functions. In practice, there will be other parties who will do this in partnership with the person. For example, the pre-employment background checks are typically conducted by the fiscal intermediary, an advocacy organization, or even the PHP/CMHSP, as part of supporting the individual to be a successful employer. This same practice may be applied to verifying provider qualifications, and/or assuring needed provider training. Depending on the nature of the training, some of it may best be provided by outside parties (e.g., first aid, CPR, blood-borne pathogens, etc.) Other training may be best performed by the consumer and those closest to him/her (e.g., specific personal care and health support tasks that revolve around the consumer’s preferences), and some training may come from the PHP/CMHSP (e.g., recipient rights, care plan implementation.)

**d. Regardless of who the employer is, how should potential conflicts of interest or exploitation in employment be determined/handled?**

- i It is very important that consumers and those who love and support them in the process of self-direction be assisted to identify and resolve situations that involve conflicts of interest, and especially, exploitation.
- S It is not the intent of the Department that individuals involved in self-determination, including arrangements that afford authority to choose, retain and direct their employees, be left to figure out how to solve these problems on their own.
- S Part of the process of people learning to (more) independently manage their own lives should include support to discern and respond to situations such as these.

- S Any ongoing support process aimed at assisting people toward independence and an improved capacity to negotiate and direct their support arrangements should be aimed, at least in part, at empowering the consumer to respond constructively to potential problem situations.
- i On the other hand, what may appear to be a conflict of interest to one party may actually be a meaningful and even intimate relationship to the party who appears to be being exploited.
  - S A thoughtful and measured response on the part of the PHP/CMHSP should be the order.
  - S Using (and reconvening as necessary) the person-centered planning process to bring up and address such potential conflicts is the primary method to address this matter, when it is a concern to a party with interest and involvement in the person's life.
  - S Being aware but treading softly, unless there is cause (i.e. evidence) for alarm should be the stance of those charged with monitoring the service delivery process.
- i There is nothing that obligates the PHP/CMHSP to maintain consumer-directed and controlled arrangements when the consumer is at risk of immediate harm (or otherwise.)
  - S There is also nothing that obligates the PHP/CMHSP to concur in and therefore support and authorize, arrangements that it believes will be detrimental to the consumer.
  - S However, as noted, use of the person-centered process is the method for responding to non-emergency apparent conflicts of interest.

**e. Can a family member, other relative, or someone who shares the same home as the consumer be an employee for the consumer?**

It is certainly possible and legal, and often a desirable option for someone who resides with the consumer, to also work directly for the consumer. In the Home Help program approximately 40% of employees are relatives, and a significant portion live in the same home. Typically, the Federal government does not permit providers of Medicaid-funded personal care-type services, to be the responsible parent of a minor, or the spouse of an adult consumer. This sort of restriction is not applicable to, for example, hiring a different relative.

When the other party providing the supports is providing those supports in that party's home, rather than the consumer's home, and these are provided on a 24-hour basis, then it would appear that Michigan's Adult Foster Care law would



come into play, and this would mean that the employment relationship would be compromised by the licencing requirements.

**f. Are overtime wages required for family members who provide care?**

There appear to be no separate standards for family members providing (paid) care, with regard to overtime requirements of the Fair Labor Standards Act (FLSA). It is possible, however, that a home care worker, family member or not, could be exempt from the overtime requirement if the work that s/he performs falls within the “companionship” exemption of the Federal FLSA.<sup>8</sup> There are also limitations for live-in care givers.

**g. What standards then apply in labor law for paying overtime, responsibility for the worker's comp, liability coverage, etc.**

Overtime, workman's compensation and unemployment compensation are established in law and are the same for any employer. They would be no different for a consumer/guardian/ family member who is the employer.

“Liability coverage” is a broad term. For example, an employer is liable for worker's compensation and unemployment, and without insurance the employer would be required to pay claims out of his/her assets. Rather than apply liability as a broad concept, it is better to specify the potential elements of liability and then secure insurance for these.

**h. What about general business liability - who is responsible for addressing areas such as wrongful discharge, overtime issues, liability for someone not trained properly, etc.?**

Wrongful discharge would seem to be non-existent where the employment contract involved at-will employment of a consumer-selected staff person. Overtime obligations are addressed through accurate payroll processing on the part of the fiscal intermediary, based upon time sheets that are verified by the employee and authorized by the consumer or his/her representative.

Liability may result for the PHP/CMHSP in terms of a disallowance of the use of Medicaid funds, if an employee is required to meet Medicaid provider qualifications and is found not to be in compliance.

When an employee has not been properly trained and a court determines that an injury or property loss occurred that was the result of the lack of proper training, then, depending on the circumstances, the PHP/CMHSP could conceivably be deemed a liable party. The key, here, is to assure that full information about the obligations and responsibilities has been provided, and

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<sup>8</sup> Cf. Sabatino & Litvak pp.276-282; Flanagan, p. 58

that the arrangements chosen are ones that can be properly supported, including meeting training needs.

**VII. a. If Pathways were the employer, may Pathways set standards regarding overtime schedules and payment?**

Of course. But hopefully Pathways would do this in partnership with the person and those closest to him/her, based upon the person's preferences. Pathways may certainly set parameters concerning the use of overtime as a cost, even when it may not be the employer.

This would be done as part of the person-centered planning process during the development of the individual budget (or, in the case of the Children's Waiver, at the point where the plan of services is costed out for the purposes of identifying the amount of resources allotted for implementation of the plan.)

When in an arrangement that supports self-determination, a consumer is authorized to choose providers, direct funds toward the payment of provider costs incurred, and to modify their choices concerning the exact type of service/support they obtain, in pursuit of goals and objectives approved for PHP/CMHSP funding in their plan. However, the PHP/CMHSP may certainly set limits upon the use of its funds. These limits would include such items as a maximum allowable gross wage amount, for example.

The determination of how and when (and even whether) overtime costs would be allowed is something that needs to be a part of discussions leading to the approval of an individual budget amount (or, in the case of the Children's Waiver, the allotted funds to carry out the plan.) While overtime, for example, may become a necessity in certain emergency situations, a prudent practice would be to limit the use of overtime, not only due to the costs associated with this, but also because of the potential for extending staff work beyond the point where car-giving can be reliably provided, due to staff exhaustion.

**b. May Pathways select the training staff and curricula for the Pathways employees working with the consumers?**

Yes. It seems that these sorts of decisions would ideally be based upon what works best for the consumers affected, developed with their input and involvement.

**c. Regardless of who the employer is, what are the exclusions of criminal background for employment for supports that are funded with capitated funds?**

The expectation is that staff providing assistance be in good standing with the law. Application of this requirement is apparently handled differently from PHP/CMHSP to PHP/CMHSP. There is typically a verification search of an applicant's criminal background. When a felony conviction is present, some PHP/CMHSPs tend to view any conviction of a felony to be a restriction to employment. Others prohibit employment when the conviction is evidence of an ongoing pattern of criminal behavior, or where the conviction is proximally related to the services/support tasks that the applicant would be engaged in.

**VIII. a. How do we assure that there is parity amongst the SDI consumers for cost (payment) of services rendered and requirements for use of family and/or community resources?**

There is no exact formula for making such a determination. Part of the issue with making a judgement about cost parity that is objective and fair is the fact that what is deemed to be of value to one individual is not the same for another individual. It is entirely possible that there could be wide variance in cost from one situation to another, but the "objective" observer would not necessarily see that there was any difference in value or outcome. This matter is not unique to self-determination, but perhaps, since costs are well-known, it is more starkly obvious.

**b. How do we determine wages that are fair to all of those who provide services under SDI?**

This is a local matter, and apparent “fairness” is not something that can be a matter of group consensus. Clearly, wages paid need to be what is necessary to get the job done, and not more. But some jobs are harder to do than others, and wage differentials are necessary. The Department would be glad to share thoughts, but prefers not to dictate.

**c. Should natural supports be provided prior to any Pathways' supports?**

Yes. But it is important to remember that, in the case of an adult, only their spouse has a legal obligation to provide care.

**d. How should we determine the baseline of what would naturally be supported before capitated funds are used?**

This would be specific to each individual's situation, and cannot be determined outside of the person-centered planning process. There are no hard and fast guidelines or standards that can be imposed.

**e. How would this be determined?**

See previous response.

**f. If there is an individual involved with SDI, who meets priority population criteria, is Pathways responsible for providing 24 hour care, regardless of natural supports?**

In the case of an individual who is an adult, the response would be, technically, yes, if that is what is required to assure the health and welfare of the consumer. However, when a person is seeking to live outside of a licensed residential setting, there are Medicaid service authorization issues, such as accessing Home Help assistance, that are not currently under the authority of the PHP/CMHSP.

**IX. a. When there are health and safety needs regarding someone under SDI, is Pathways then responsible for providing 24 hour care for someone who lives with family members if they are part of the priority population?**

Self-determination arrangements on a case-by-case basis are voluntary on the part of the PHP/CMHSP, and would remain so, even if the current policy draft is finalized and applied. Therefore, this would appear to be a part of the process of reaching agreement on a plan of services and on an accompanying individual budget.

**b. What is the recommendation for using a fiscal intermediary?**

- i It is strongly recommended that an independent third party entity be retained to perform payroll processing and related support functions typical of a fiscal intermediary.
  - S While, strictly speaking, it is legal for the PHP/CMHSP to attempt to take on and become the IRS-approved Employer Agent for handling the payroll functions of consumer-employed workers, this route is discouraged.
  - S The reasons are obvious: When the legal relationship is not separated, it is more likely that a third party, intervening where there is a problem, would view and pursue the PHP/CMHSP as a co-employer.
  - S That is not to say that these functions could not be cleanly separated; only to say that the amount of cost-savings associated with taking these payroll and employment support functions in-house does not appear to be significant in relationship to the possible problems this can cause.
  - S Often for the consumer or family member, there is a greater comfort level and therefore a greater potential for open and honest communication and problem-solving when the employment support functions and the payment functions are provided through an independent third party designed specifically for these purposes.
  - S Navigating the administrative mechanisms inherent in a PHP/CMHSP is not only more confusing for a consumer or family member, it may also be intimidating on several levels.
- i Use of a fiscal intermediary is part of the Choice Voucher System and is outlined in the Self-Determination Technical Advisory booklet.
  - S It is the intent of the Department to expand on the details associated with constructing, implementing and managing the fiscal intermediary piece.
  - S The recommendation is for Pathways to seek and retain an entity that has experience with and has successfully performed as a fiscal intermediary elsewhere.

**c. If this is an option, please provide the written technical assistance that we need which would assure that Pathways would meet all IRS, Department of Treasury, and the DCH Audit Division requirements.**

This product is currently under construction.

- X. a. Typically, a case manager or supports coordinator facilitates service arrangements that are too cumbersome for a consumer or family/guardian to independently obtain and organize. Under SDI/CWCV, if the consumer/parent/guardian is capable of being the employer, is there then a need for a case manager/supports coordinator?**

The functions of Supports Coordination or Case management, as the term applies, are still functions that the PHP/CMHSP needs to assure, as necessary. Among these are: Plan development, plan authorization and plan monitoring. Even if a consumer/guardian/employer may not want this involvement, it is required. In particular, plan monitoring - - the following along of a person's plan of services/supports in order to assure that services needed and authorized in the face of a person's needs, are being received - - is an essential element of PHP/CMHSP accountability. How this is to happen needs to be worked out in the PCP process and specified in the plan. The decision that is finally made should include accommodation of the person's preferences and be mutually agreed upon. But monitoring is a non-negotiable item. Its frequency should be based upon consumer needs and preferences.

- b. If a CSM/SC is required, what exactly would be the duties and responsibilities of that position?**

Please see the response to the previous question.

- XI. a. With a vendor fiscal ISO model, would Pathways continue to be considered the employer of record?**

The vendor fiscal ISO model (which is essentially what the Choice Voucher System entails in large part) comes from the writings of Susan Flanagan and Pamela Green, based on their review of consumer-directed personal assistance services across several states, and published in 1997. It is felt that Pathways would not be considered to be the employer if the arrangement is properly constructed and supported. Cf: item VI-a, above.

- b. What documentation needs to be in the clinical record to document that a service or support was provided - being these are capitated funds?**

This is a locally prescribed process, and must meet the general requirements of the contract between the Department and the PHP/CMHSP. However, the emphasis ought to be upon taking a conservative approach to documentation requirements. For example, while time reporting may need to be made to the nearest 15-minute increment, that does NOT mean that personal assistant workers should be expected to document their activities every fifteen minutes.

**c. Under SDI, are consumers purchasing a service or are they hiring employees?**

Simply put, Pathways is actually purchasing the service, in that the funds are the property and responsibility of Pathways, and Pathways has delegated to the consumer or family member the right to direct the use of the funds towards providers chosen by the consumer or family member. But, the consumer or family member is hiring employees, not Pathways.

**d. How does this make things different?**

This general question is answered throughout the responses to other questions in this document.

**e. When the administrative needs of the program conflict with individual needs, how do we resolve it?**

This question requires a specific example or two in order to determine a response. In general, the individual's needs are what ought to be paramount. However, there are always differences of opinion about whether an administrative practice is in conflict with an individual's needs, when the situation is not black and white.

**f. What can be done if multiple service providers come into the home? This could harm the well being of the individual.**

Again, an example would make it easier to respond more specifically. For example, by multiple service providers, do you mean more than one person? More than one staff coming in at the same time? Individuals of different levels (e.g. HS graduate, vs. bachelor's level, vs. professional level, such as a nurse or physical therapist? People who come from different organizations? Etc.)

Multiple service providers should be coordinated through the Supports Coordination process. If there are problems, these need to be addressed through the supports coordinator and in the PCP process.

**XII. a. Please verify that due to recent case decisions, Home Help services should always be applied for prior to determining what supports or services Pathways should provide.**

**b. Please also discuss the inability of Pathways to supplement home help wages, and that Pathways is, in fact, the payer of last resort.**

**c. Who pays for the difference when FIA and Pathways amounts do not meet the needs of the person?**

**d. What if an individual wants to use only Pathways services even if eligible for Home Help or Home Health Services?**

**e. Can consumers/guardians/family members be paid directly?**

No.

**f. What if Home Health Services are recommended due to medical concerns, but the family declines the service and wants Pathways to provide it instead.**

**g. Can Pathways pay the whole amount for services provided, during the time that FIA is making their determination regarding Home Help Services?**

**h. Can there be retroactive reimbursement to Pathways, pending a decision from FIA?**

**i. Is it the department's position that FIA is under the control of the CMH?**

**j. How does the Home Help arrangement through FIA correlate with the SDI program?**

The questions above (items XII a- j) are questions that do not necessarily apply just to self-determination. They relate to the interface between the Home Help program and the prepaid specialty waiver arrangement. The Department intends to answer these and related questions regarding use of the Home Help program to support people living independently, in a subsequent document, as part of its effort to resolve problems with this interface.

**k. For example, does FIA provide worker's comp for their home help staff?**

When Home Help is provided via the beneficiary as employer mechanism, FIA does not provide for worker's compensation insurance. However, when Home Help is provided via the 'Home Help provider agency' route, the local FIA allows agency overhead costs to be accounted for in the rate. This typically includes an amount for worker's compensation insurance.

**l. What about overtime issues?**

Not necessarily a SD question/issue

**m. Training issues?**

Not necessarily a SD question/issue

**n. What happens when both FIA and CMH are providing services to one employer**



**(the consumer) as far as taxes, liability, comp, and unemployment?**

If the arrangement involves the sort of Home Help direct employer model, then the State, in the person of the Department of Community Health, handles payroll tasks for the Home Help portion of services. Cf. Item "k." above

**o. When using capitated funds within SDI, does that mean supports and services need to follow guidelines as set forth within the state plan and/or alternative services? There have been instances of paying for vacations, computers that are not part of assistive technology, etc. - if these purchases do not fall under the definition of services and supports as described, can they still be provided using capitated funds?**

As stated in the Draft Self-Determination policy, a person's eligibility for particular services/supports does not change by virtue of their participation in a self-determination arrangement. Services and supports provided with Medicaid funds through a self-determination arrangement must comply with Medicaid requirements.

**p. Can assets be purchased using capitated funds for SDI, such as vehicles?**

The general answer is, no. Medicaid law frowns on the provision of assets that can be converted into cash by a beneficiary. There are, of course, exceptions to this. Examples would be environmental modifications, and prescribed adaptive equipment.

**q. Is there a difference if someone is on the HCB waiver?**

No.

**r. Are items such as rent, personal insurance, worker's comp. etc., covered under SDI, i.e. paid for with capitated funds? If so, how would this service be recorded/reported to Medicaid?**

Cf: item "o," above.

**s. Can we use capitated funds to pay vehicle leases, or vehicle insurance/plates/gas/maintenance, etc. for vehicles used to assist the consumer to access the community?**

Yes, as long as these are specific to goals, objectives and outcomes in the person's plan that the PHP/CMHSP has agreed to support, are within the realm of the intent of the specialty plan (not all consumer-required transportation is eligible through the specialty plan), and are authorized services. As with all Medicaid services, the authorization must be based on need, and must take into account factors such as Medicaid prudent purchaser requirements and other Medicaid requirements.

**t. What about mileage reimbursement to providers of CLS when they use their personal vehicles while directly providing CLS?**

Not necessarily a SD question/issue, but this practice is carried out in other PHP/CMHSPs.

**u. Can we pay mileage?**

Not necessarily a SD question/issue, but this practice is carried out in other PHP/CMHSPs.

**v. We are currently paying mileage for consumer's employees as they travel to the consumers home to work. Is this allowable?**

Not necessarily a SD question/issue. Typically, employers set the arrangements under which their employees are compensated. Thus, it would be up to the consumer/guardian/parent/ally employer to set these arrangements in the employment agreement. Pathways, however, may certainly set limits on the use of funds they are authorizing in an individual budget. For additional perspective, see the response to item VII-a, above.

**w. How will Chapter III changes affect SDI?**

They won't. Chapter III addresses Medicaid services. The arrangements that support self-determination are not Medicaid services, even though the services provided, are. Therefore, services/supports that are provided through the auspices of the Medicaid program must comply with Chapter III as well as other Medicaid requirements. As self-determination continues to evolve, the Department will work cooperatively with the PHP/CMHSPs to provide additional technical assistance and guidance with self-determination concerning how it interfaces with the requirements of the Medicaid program.

#### **x. What about the Master Contract?**

Section 18.0: " Entire Agreement" in Part I of the Contract for Medicaid Specialty Services and Supports lists the documents that relate to the contract:

Included are:

- A. This contract including attachments and appendices.
- B. The standards as contained in Application for Participation (AFP) and the plans of correction and subsequent plans of correction submitted and approved by MDCH and any stated conditions, as reflected in the MDCH approval of the application unless prohibited by federal or state law.
- C. Michigan Mental Health Code and Administrative Rules
- D. Michigan Public Health Code and Administrative Rules
- E. Approved Medicaid Waivers and corresponding CMS conditions, including 1915(b) and (c) waivers
- F. MDCH Appropriations Acts in effect during the contract period
- G. Balanced Budget Act of 1997 (BBA) final rule effective 42 CFR 400, et al June 14, 2002.
- H. All other pertinent Federal and State Statutes, Rules and Regulations
- I. All final MDCH guidelines, and final technical requirements, as referenced in the contract. Additional guidelines and technical requirements must be added as provided for in Part 1, Section 16.0 of this contract.
- J. Policy manuals of the Medical Assistance Program and subsequent publications.

The AFP described in item B above, included a standard for Self Determination which called for each PHP to submit a proposed a plan for making self determination arrangements available in their service areas. A department m guideline to assist PHPs in this endeavor is in draft form. When completed, the guideline will be added to the contract through the contract amendment process. MDCH will issue technical advisories to PHPs and CMHSPs as more information on self determination becomes available. Technical advisories provide guidance to the field and are not contract requirements.

**y. What is the future of SDI for the mentally ill population?**

The Self-Determination Policy and Practice Guideline is intended to apply to adults with mental illness issues as well as those with developmental disabilities-based support needs. In practice there are several elements of difference. These include the general orientation and approaches to treatment that are held by the mainstream of mental health services treatment professionals and administrators; the differences in the nature of public program expenditures for responding to the needs of consumers with mental illness issues, and the varying nature of a person's support needs, over a given time period. Many of the specific issues discussed herein may not be pertinent to persons with mental illness who may want to pursue arrangements that support self-determination. For the past three years, the Department of Community Health has offered block grant awards to a small number of PHP/CMHSPs who are seeking to plan for and implement self-determination for persons with mental illness. The Department will continue to provide guidance and technical assistance to these awardees. The outcomes of their projects will shape the development of future guidance to the field. It is reasonable to conclude that work to develop viable options to supporting adults with mental illness issues to engage in self-determination, is an area that will require more concrete examples and case studies to emerge.